

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSEPH SKOLNIK :
for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the :
Tax Law for the Period July 1982 through :
October 1983. :

In the Matter of the Petition :
of :
MICHAEL MARKOWITZ :
for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the :
Tax Law for the Years 1982 and 1983. :

In the Matter of the Petition :
of :
GAS STOP, INC. :
for Revision of a Determination or for Refund :
of Motor Fuel Tax under Article 12-A of the :
Tax Law for the Period July 1982 through :
February 1984. :

In the Matter of the Petition :
of :
JOSEPH SKOLNIK, :
OFFICER OF SHOPPERS MARKETING, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1982 :
through November 30, 1983. :

DETERMINATION
DTA NOS. 801734,
801735, 801744,
807078, 807556,
807557, 812601
AND 812602

In the Matter of the Petition :
of :
MICHAEL MARKOWITZ, :
OFFICER OF SHOPPERS MARKETING, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1982 :
through November 30, 1983. :

In the Matter of the Petition :
of :
SHOPPERS MARKETING, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1982 :
through November 30, 1983. :

In the Matter of the Petition :
of :
GAS STOP, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1983 :
through February 29, 1984. :

In the Matter of the Petition :
of :
JOSEPH SKOLNIK, :
OFFICER OF GAS STOP, INC. :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1983 :
through February 29, 1984. :

Petitioners Michael Markowitz, Gas Stop, Inc. (12-A tax liability), Michael Markowitz,

officer of Shoppers Marketing, Inc., c/o Law Offices of Marvin E. Kramer, 1325 Franklin Avenue, Garden City, New York 11530, filed petitions for revision of determinations or for refund of motor fuel tax under Article 12-A of the Tax Law for the years 1982 and 1983 and the period July 1982 through February 1984 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through November 30, 1983.

Petitioner Joseph Skolnik, 5889 Northwest 23rd Terrace, Boca Raton, Florida 33496, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period July 1982 through October 1983, and petitioners Joseph Skolnik, officer of Shoppers Marketing, Inc., and Shoppers Marketing, Inc., 5889 Northwest 23rd Terrace, Boca Raton, Florida 33496 and c/o Joseph Skolnik at the same address, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through November 30, 1983. Petitioners Gas Stop, Inc. and Joseph Skolnik, officer of Gas Stop, Inc., c/o Joseph Skolnik, 5889 Northwest 23rd Terrace, Boca Raton, Florida 33496, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through February 29, 1984.

A consolidated hearing was commenced before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 18, 1994 at 1:15 P.M. and continued to conclusion at the same location on May 19, 1994 at 9:00 A.M., with all briefs to have been filed by September 30, 1994. Petitioners Michael Markowitz (Estate of), Gas Stop, Inc. (Article 12-A liability only), and Michael Markowitz (Estate of), officer of Shoppers Marketing, Inc., appeared by John Fabrikant, Esq. Petitioners Joseph Skolnik, Joseph Skolnik, officer of Shoppers Marketing, Inc., Gas Stop, Inc. (Articles 28 and 29 liability only) and Joseph Skolnik, officer of Gas Stop, Inc., appeared by Leonard Reed Rosenblatt, Esq. Petitioner Shoppers Marketing, Inc. (DTA #807556; sales tax liability for the period September 1, 1982 through November 30, 1983) did not appear. The Division of

Taxation appeared by William F. Collins, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly issued assessments to petitioners Michael Markowitz, Joseph Skolnik and Gas Stop, Inc. for additional motor fuel tax under Article 12-A of the Tax Law and whether those petitioners owed additional motor fuel tax under Article 12-A of the Tax Law.

II. Whether the Division of Taxation properly requested books and records of Gas Stop, Inc. and Shoppers Marketing, Inc. prior to resorting to external indices to determine the amount of motor fuel and sales and use taxes due from those petitioners.

III. Whether petitioner Joseph Skolnik was a person responsible for the collection of sales and use taxes on behalf of Gas Stop, Inc. and Shoppers Marketing, Inc. for the periods in issue.

IV. Whether the Division of Taxation has carried its burden of proving fraud against Gas Stop, Inc. and Shoppers Marketing, Inc. and its officers for the periods March 1, 1983 through February 29, 1984 and September 1, 1982 through November 30, 1983, respectively.

V. If the Division is not able to prove fraud against Gas Stop, Inc. and Shoppers Marketing, Inc. and its officers, whether the statute of limitations bars it from asserting any additional taxes due from said corporations.

VI. Whether petitioner Michael Markowitz was a person responsible for the collection of sales and use taxes on behalf of Shoppers Marketing, Inc. for the period September 1, 1982 through November 30, 1983.

FINDINGS OF FACT

The eight actions set forth in the captions above resulted from the Division of Taxation's ("Division") issuance of eight assessments, to wit:

(a) Gas Stop, Inc. filed a petition to review Notice No. 2449, dated December 10, 1984, issued to Shoppers Marketing, Inc., and/or Gas Stop, Inc., and/or Lesez Petroleum Corp., and/or Michael Markowitz, and/or Joseph Skolnik, and/or David Bogatin, and/or Mieczyslaw Szczepkowski by the Division. The notice assessed motor fuel tax in the amount of

\$4,662,250.02, plus penalty, for the period July 1982 through October 1983. Gas Stop, Inc. also petitioned Notice No. 2455, dated December 10, 1984, issued to Gas Stop, Inc. by the Division which assessed motor fuel tax in the amount of \$920,215.60, plus penalty, for the period April 1983 through February 1984.

(b) Joseph Skolnik filed a petition to review Notice No. 2449, issued to Joseph Skolnik, and/or others as more fully described in (a) above.

(c) Michael Markowitz filed a petition to review Notice No. 2449, issued to Michael Markowitz, and/or others as more fully described in (a) above.

(d) Michael Markowitz, as officer of Shoppers Marketing, Inc., filed a petition to review two notices of determination, Notice Nos. S880104875M and S880104876M, dated January 4, 1988, issued to Shoppers Marketing, Inc. and Michael Markowitz, as officer, respectively. The notices assessed sales and use taxes in the amount of \$4,883,696.20, plus penalties, including the fraud penalty, and interest for the period September 1, 1982 through November 30, 1983.

(e) Shoppers Marketing, Inc. filed a petition to review a Notice of Determination, Notice No. S800104875M, dated January 4, 1988, which set forth additional sales and use taxes due of \$4,883,696.20, plus fraud penalty and additional interest, for the period September 1, 1982 through November 30, 1983.

(f) Joseph Skolnik, as officer of Shoppers Marketing, Inc., filed a petition to review a Notice of Determination, Notice No. S880127878M, dated January 27, 1988. The notice assessed sales and use taxes in the amount of \$4,883,696.20, plus penalties, including the fraud penalty, and interest, for the period September 1, 1982 through November 30, 1983.

(g) Joseph Skolnik filed a petition to review a Notice of Determination, Notice No. S880420882M, dated April 20, 1988, issued to Joseph Skolnik, vice-president of Gas Stop, Inc. The notice assessed sales and use taxes in the amount of \$1,064,511.20, plus penalty, including the fraud penalty, and interest, for the period March 1, 1983 through February 29, 1984.

(h) Gas Stop, Inc. filed a petition to review a Notice of Determination, Notice No.

S880420881M, dated April 20, 1988. The notice assessed sales and use taxes in the amount of \$1,064,511.20, plus penalties, including the fraud penalty, and interest, for the period March 1, 1983 through February 29, 1984.

By way of background, Shoppers Marketing, Inc. ("SMI") was a New York corporation incorporated under the laws of the State of New York on April 1, 1982 to buy and sell batteries, tires, oil and automobile accessories and to acquire such property, real and personal, necessary to conduct the business. Copies of any process served on the Secretary of State were to be served on Harold Wapnick, an accountant who provided services to Michael Markowitz and, to some extent, Joseph Skolnik. Mr. Wapnick was also the individual who filed the certificate of incorporation of SMI.

Mr. Wapnick was the same individual who filed certificates of incorporation with the New York State Secretary of State on behalf of Avenue Y Gas, Inc., on December 17, 1982, which corporation was to engage in the business of a gasoline service station, and AVI Enterprises, Inc., on February 9, 1982, also to engage in business as a gasoline service station.

A Republic National Bank savings account authorization certificate, executed on July 7, 1982 (three months after incorporation), indicated that the president was Szpila Tadeusz and the secretary was Leon Bercovici.

By agreement dated December 1, 1982, Szpila Tadeusz sold SMI to Mieczyslaw Szczepkowski for \$130,000.00 by transferring 10 shares of stock in the corporation. The agreement recited that SMI was a registered motor fuel distributor, holding registration number M-2352, issued on July 8, 1982. The sale agreement also stated that SMI had an agreement with Wechter Petroleum Corp. ("Wechter") and/or General Oil and AVI Enterprises, Inc. ("AVI") to terminal SMI's product, and that AVI was a nominee for SMI.

The transfer took place on February 21, 1983.

On March 3, 1983, Wechter entered into a terminalling agreement with AVI, which was to act as the terminal. Wechter was to provide monthly "throughput" statements to AVI, indicating the quantities of petroleum product ("product") received and delivered and the

quantities in storage. AVI was to be responsible for all Federal, State and local taxes.

Mieczyslaw Szczepkowski signed the agreement for AVI as "president".

Mr. Szczepkowski was a Polish national who did not speak English. He signed documents and checks for SMI, but was not able to communicate with either Mr. Markowitz or Mr. Skolnik, petitioners herein.

Mr. Markowitz testified at the criminal trial of Joseph Skolnik that the agreement set forth in Finding of Fact "4" was masterminded by himself, Joseph Skolnik, David Bogatin and their attorneys, and that Messrs. Tadeusz and Szczepkowski were only fronts for the real shareholders, i.e., Mr. Bogatin as the purchaser of SMI and petitioners Markowitz and Skolnik as the sellers, who he referred to as the joint "principals" and the recipients of \$40,000.00 in product from Bogatin to each from the sale proceeds.

Markowitz and Skolnik continued to purchase gasoline product using the SMI name even after the sale, particularly from Lesez Petroleum, another corporation controlled by David Bogatin.¹

Markowitz stated that it was "customary" practice in the gasoline industry, to which he and petitioner Skolnik were relatively new and inexperienced in the early 1980's, to reduce their exposure to liability (they both had real estate holdings to protect); they decided not to associate their names with any Article 12-A corporation and to use instead a "front guy" who would shield them from any tax liability.

Petitioners Markowitz and Skolnik were each 50% owners of SMI and Gas Stop, Inc., the latter of which received its Article 12-A motor fuel distributor's license in December of 1982.

SMI was petitioners Markowitz's and Skolnik's first foray into wholesale gasoline distribution. They had previously been involved in the retail side of the business. They found that being a 12-A distributor enabled them to get better prices for product without a middleman.

¹Mr. Bogatin pleaded guilty to two class E felonies for willfully filing a false return or statement with the Tax Department pursuant to Tax Law § 289-b(2) on March 11, 1987.

After SMI was sold in February 1983, petitioners Markowitz and Skolnik continued to purchase product in the SMI name, continuing to receive all the advantages of trading as a motor fuel distributor on a wholesale level but without the 12-A license they transferred to Bogatin.

Gas Stop, Inc. ("GSI") was also a 12-A motor fuel distributor incorporated in 1967, but it did not begin to conduct business in motor fuel until 1982. Petitioners Markowitz and Skolnik were also the principals/owners of this company and its sole shareholders, with Markowitz serving as its president and Skolnik as its vice-president.

A sales tax and motor fuel tax audit was conducted by the Division of SMI, GSI and persons associated with those corporations.

In April 1983, the Division's auditor, Grace Isaacs, commenced an audit of SMI from the Mineola District Office. As stated above, SMI was registered as a New York State motor fuel distributor in July 1982 and was issued registration number M-2352. SMI's application for registration as a distributor of gasoline listed its address as 3912 New Utrecht Avenue, Brooklyn, New York. Szpila Tadeusz was listed as SMI's president at the address of 2024 East 18th Street, Brooklyn, New York, which is the residence address of Harold Wapnick, long-time accountant for petitioner Markowitz.

When the auditor visited the New Utrecht Avenue address, SMI was not located there and no forwarding address was left with the United States Postal Service. The owners at New Utrecht Avenue said they sometimes collected mail and took telephone calls for SMI. The auditor unsuccessfully attempted to contact the president of SMI, Szpila Tadeusz. Finally, the auditor called the second address given on SMI's application for registration which was the address of SMI's accountant, Harold Wapnick. Wapnick told the auditor that he did not know if he was still employed by SMI. Ms. Isaacs continued to attempt to contact SMI's president, Szpila Tadeusz, but was finally told by Mr. David Bogatin to call Harold Wapnick. Numerous oral requests were made to Wapnick for SMI's books and records; however, only a small amount of truck delivery tickets and three or four incomplete pages of a purchase journal were

provided. Despite 15 to 20 requests thereafter, no other records were produced by Mr. Wapnick.

In October 1983, the auditor was instructed to work with the New York State Bureau of Tax Investigation ("BTI"). On October 26, 1983, subpoenas were issued by the New York State Department of Taxation and Finance to Joseph Skolnik, Michael Markowitz and others for all bills and records pertaining to the business of Shoppers Marketing, Inc., from September 1, 1982 to the present (which was October 26, 1983). The subpoena was received and signed for by Joseph Skolnik on October 27, 1983. Since the subpoenas were never honored, the books and records of SMI were never obtained by the Division. The subpoena requested the following books and records from SMI for the period September 1, 1982 through October 26, 1983:

- All purchase and sales invoices
- Bank statements
- Cancelled checks
- Deposit slips
- Any and all corporate bank accounts
- Corporate copy of all tax returns filed in New York City,
New York State and United States Government
- Cash receipts book
- General ledger
- Sales journal
- Accounts receivable ledger
- Accounts payable ledger
- Purchase journal
- Corporate minutes
- Incorporation papers

Due to the corporation's failure to provide books and records, the audit of SMI's motor fuel tax liability was based on third-party information obtained from internal records of the Division and from information which was obtained from the investigation for the criminal trial of People v. Skolnik. The auditor based the audit results only on those transactions that were determined to be billed to SMI and/or AVI, its nominee. Also, as gasoline is a volatile liquid which results in variations between the quantity of gas received and what a supplier records in its books, the auditor always used the most conservative figures to determine the tax due.

The information received by the Division included data received from New Jersey Barge Reports, barging companies, motor fuel terminals, distributors and suppliers who had sold fuel

to SMI. The number of gallons of motor fuel was determined from suppliers' invoices, from the records of receipt of product transported by each barge. Gallons used for the assessments included the figures used in the criminal trial, including the gallons purchased from Astroline Corporation, Delphi Petroleum, George E. Warren, Northville Caribbean, Warren Petroleum and Sun Oil.

A total of 49,598,663 gallons of motor fuel was identified, which included over 42 barge deliveries imported from the State of New Jersey but never reported to the State of New York and upon which no motor fuel tax was paid. In addition, suppliers' invoices showed tax-free sales to SMI, the importer of record. SMI was also assessed for 5,706,794 gallons of motor fuel which it reported on its motor fuel tax returns as tax-free sales to EFCO, because EFCO denied ever receiving this product.

Specific information was obtained from the Wechter Terminal, also known as the Inwood Terminal, on Long Island. Wechter Petroleum is a terminal corporation which warehouses product which is usually received by water, via barges. Wechter had an agreement with AVI to receive barges containing product to be stored at its terminal. Telexes to Wechter from AVI and barge receipts demonstrated that Wechter was authorized to receive, and did in fact receive, barges of fuel that were ordered by SMI for deposit into the account of AVI. Daily and month-end stock reports also reported product storage transactions between Wechter and AVI. The Division determined that all product deposited into the AVI account was also withdrawn from that account. Also, Philip Wechter, the manager of supply and distribution, testified that any questions regarding the account of AVI were handled by Joseph Skolnik, Michael Markowitz and Jerry Skolnik.

Wechter was affiliated with a company called General Oil, a marketing company of petroleum products. General Oil presented numerous invoices issued to SMI for petroleum product. The Division traced the motor fuel purchases of SMI through the New Jersey barge reports to the supplier and noted that the barging companies always picked up the product at various New Jersey terminals. Astroline Corporation also provided documentation which

demonstrated sales of product to SMI which came from New Jersey and Warren Petroleum supplied documents of barges loaded in New Jersey which were invoiced to Gas Stop.

Documentation from two barging companies, Eklof Marine and Poling Transportation, was examined. It revealed that barges were ordered by SMI and barge invoices were addressed to SMI. However, the product was delivered to the AVI terminal account.

While Szpila Tadeusz was listed as the president of SMI, the records relied upon by the division consistently referred to Joseph Skolnik and Michael Markowitz. Joseph Skolnik independently became a registered motor fuel distributor (registration number M-2373) on September 3, 1982. This registration was cancelled on June 17, 1983 for Skolnik's failure to respond to the Division's bond requests.

The sales tax audit of SMI was conducted in conjunction with the motor fuel tax audit. The Division noted that the taxable gallons reported on SMI's motor fuel tax returns were approximately equal to the amount of gallons reported on its sales tax returns. To determine the price of each gallon subject to sales tax, the Division used the dollars reported on each sales tax return and compared it to the number of gallons reported on the motor fuel tax return as taxable. This amount was divided by the number of gallons to determine the price per gallon for assessing each additional gallon in each period.

A motor fuel and sales tax audit was also conducted on Gas Stop. Gas Stop registered as a distributor of motor fuel in December 1982 (certificate number 2410). The address listed for Gas Stop was 1611 Avenue Y in Brooklyn, the same address used by SMI. On June 27, 1984, Gas Stop's books and records were requested from the corporation's accountant, Harris Polansky, for the period September 1982 to date. The request specifically stated, in part as follows:

"Kindly have available for this appointment all books and records including but not limited to the following:

- Power of Attorney
- Tax Returns
- General Ledger
- Cash Journals
- Purchase and Sales Journals

Check Books, Bank Statements and cancelled checks
Thru-put statements
Letters of credit and like agreements
Purchase and Sales Invoices
Barging Invoices
Inventory Records
Accountant's and Bookkeeper's workpapers."

No records were ever provided. As no records were provided, the tax was determined based on third-party information. With respect to the motor fuel tax, the gallons of product were determined from suppliers' tax returns, the Division's internal documents known as forms MT-123.1, records of "throughput" accounts at the New York Fuel Terminal a/k/a Manhattan and Queens Terminal and various barging receipts. In addition, Warren Petroleum reported tax-free sales of \$634,000.00 to Gas Stop, per Warren's tax returns. Gas Stop protested that the sales were made to SMI; however, these purchases were not reported by either Gas Stop or SMI. Gas Stop did not report purchases of gallons sold to Gas Stop tax-free by New York Fuel Terminal, Warren Petroleum, Lesez Petroleum and EJS, or report purchases or sales of fuel that were debited and credited to Gas Stop's "throughput" account at New York Fuel Terminal. Also, it was determined that Gas Stop overstated tax-free sales from "Northbrook".

The amount of sales tax due for Gas Stop was determined from the same gallons that were assessed for motor fuel tax purpose. Like the audit done for SMI, the average sales price determined for each gallon was computed by comparing the money amount of sales reported by GSI for sales tax purposes with the number of gallons upon which motor fuel tax was paid by GSI. Joseph Skolnik signed the motor fuel tax returns of Gas Stop as vice-president and has stipulated to being its vice-president.

Angela Nedelka testified at both the hearing and the criminal trial of People v. Skolnik. Ms. Nedelka worked for Joseph Skolnik and his various companies from 1975 to 1985 as a bookkeeper. From 1982 to 1983, Ms. Nedelka worked at 1611 Avenue Y in Brooklyn. Many different corporations conducted business out of that Avenue Y location, including GSI and EJS Distributors. The businesses conducted from the premises at 1611 Avenue Y were owned by Joseph Skolnik and Michael Markowitz. Skolnik and Markowitz were present on the premises

on a regular basis.

Ms. Nedelka testified that a checkbook and a sales journal for SMI were kept at 1611 Avenue Y. At the direction of Skolnik and Markowitz, Ms. Nedelka wrote checks on behalf of SMI, did bookkeeping work for EJS and GSI and made fuel purchases.

Ms. Nedelka made fuel purchases at the request of petitioners Skolnik or Markowitz. When Ms. Nedelka first started working at 1611 Avenue Y, Markowitz and Skolnik told Ms. Nedelka to identify herself to purchasers of motor fuel as Anne from SMI. Ms. Nedelka called various suppliers to obtain product prices and relayed this information to Skolnik and Markowitz. At their direction, Ms. Nedelka was instructed to either purchase the product or not. Markowitz and Skolnik also directed Ms. Nedelka with regard to which terminal the product should be delivered to and how payment should be made.

Ms. Nedelka, at Skolnik's and Markowitz's direction and in the presence of Skolnik, also conducted the belated preparation of sales invoices for SMI. Ms. Nedelka was told that an audit was being conducted for SMI and the accountant needed invoices. As no invoices for SMI existed, Ms. Nedelka was instructed to create invoices. Using a copy machine and existing invoices of EJS and GSI, Ms. Nedelka covered the letterhead of the EJS and GSI invoices with the letterhead of SMI. The manufactured invoices were then numbered sequentially. Mr. Wapnick gave Ms. Nedelka a sum total figure for each month that the invoices had to equal. Each invoice was created using individual deliveries recorded in SMI's sales journal. Accordingly, all sales were not recorded on SMI's returns because invoices were created only up to the provided total amount.

On July 31, 1985, Michael Markowitz, Joseph Skolnik and David Bogatin were indicted (Indictment No. 29-1119AG) by a grand jury in Albany County Court of the State of New York. The indictment consisted of 14 counts. Seven of the counts alleged a violation of Tax Law § 289-b(2) and seven of the counts alleged a violation of section 175.35 of the Penal Law of the State of New York. The counts dealing with Tax Law § 289-b(2) charged that the defendants, acting in concert, being distributors or owners of motor fuel, did file or cause to be filed returns

or statements, as required under Article 12-A of the Tax Law, which were willfully false for the periods December 1, 1982 through July 31, 1983. The counts dealing with section 175.35 of the Penal Law charged that the defendants, acting in concert, with intent to defraud the State or any political subdivision thereof and knowing that a written instrument, namely the New York State Return of Tax on Motor Fuels (Form MT-104) of Shoppers Marketing, Inc., contained a false statement or false information, did offer or present it to a public office or public servant, namely the New York State Department of Taxation and Finance, with the knowledge or belief that it would be filed with, registered in or otherwise become part of the records of such public office or public servant.

A plea agreement between the New York Attorney General and David Bogatin was entered into before Judge Harris on March 11, 1987. Bogatin entered a plea of guilty on counts 1 and 13 of the indictment, both violations of Tax Law § 289-b(2), a class E felony, in full satisfaction of all counts of the indictment. Bogatin's allocution for his plea of guilty implicated both Markowitz and Skolnik with respect to the acts underlying these two counts.

Michael Markowitz also entered into a plea agreement with the State of New York. Markowitz pleaded guilty to counts 1, 3 and 13 of the indictment, all violations of Tax Law § 289-b(2). As part of that agreement, Markowitz agreed to pay restitution to New York State in the amount of \$3,000,000.00 in taxes. The agreement noted that the New York State Department of Taxation and Finance is not bound by the agreement and may civilly or administratively assess additional taxes, penalties and interest. Markowitz also agreed to make any books and records relating to the fuel oil and gasoline business available to the New York authorities and agreed to fully cooperate with prosecutors concerning the ongoing investigation of criminal activity within the fuel oil and gasoline industry in New York State. As part of this cooperation, Markowitz agreed to testify before all New York State court hearings.

After a full trial in the Albany County Court (Harris, J., presiding) in People v. Skolnik, Skolnik was acquitted. During the criminal trial of Skolnik, Markowitz testified on behalf of the State. Markowitz stated that shortly after SMI was incorporated, he and Joseph Skolnik

became business partners and 50/50 partners in SMI; that Szpila Tadeusz was listed as the owner of SMI to shield Markowitz and Skolnik from any liability should any dispute arise; that Markowitz and Skolnik shared SMI's profits 50/50; and that he and Skolnik also owned several other companies, including GSI, AVI and EJS. AVI was used for a "throughput" account on Long Island for the storage of gasoline.

Markowitz testified that SMI conducted business from the offices at 1611 Avenue Y and became an article 12-A distributor in 1982. Through SMI, Markowitz and Skolnik purchased and sold product. Markowitz and Skolnik made joint decisions concerning the purchase of product for SMI and conferred with each other on a daily basis. A Republic National Bank account for SMI was opened initially with the name of Szpila Tadeusz; later, Markowitz and Skolnik signed the account as president and secretary. At some point in time, the names of the owners of SMI were changed from Tadeusz and Bercovici to Markowitz and Skolnik until the business was "sold".

Markowitz eventually became a partner in Skolnik's business of GSI and thereafter GSI applied for a 12-A distributor number. For a period of time, Markowitz and Skolnik operated both SMI and GSI with M numbers until SMI was sold.

Markowitz and Skolnik eventually "sold" SMI to David Bogatin and received a "profit" on its sale in the amount of \$40,000.00 each. As mentioned above, the "profit" was received by Skolnik and Markowitz in free product from Bogatin's companies, one of which was Lesez Corporation. Bogatin also attempted to shield his liability for SMI's obligations by using a non-English-speaking man named Mieczyslaw Szczepkowski to sign all papers and act as the president of SMI.

On February 25, 1983, a Motor Fuel Distributor Information Report was filed for SMI listing Mieczyslaw Szczepkowski as president. The business address changed from 1611 Avenue Y to 6500 Jericho Turnpike, Commack, New York sometime thereafter.

Both before and after the "sale" of SMI to Bogatin, SMI purchased gas from Bogatin's company, Lesez. The sales invoices issued by Lesez to SMI all stated that tax was included in

the sales price; however, the gas was sold without tax included. It was obvious that the tax was not paid because Markowitz and Skolnik knew what the purchase price of the product was and the amount of tax that should be paid. If tax was included in the price, it would be impossible for Bogatin to have made a profit. Markowitz also testified that he knew that all the gallons purchased by SMI were not recorded on its tax returns. Around May or June of 1983, Markowitz and Skolnik were no longer involved in purchasing product for SMI because SMI was under investigation. Markowitz and Skolnik continued to purchase product for GSI from Lesez.

After SMI was "sold", Markowitz and Skolnik continued to help with SMI's operation on a daily basis and were compensated by purchases of gasoline for GSI without tax from Bogatin's companies, SMI and Lesez, and by the fact that they were buying for themselves at wholesale without having their own "M" number. Prior to the "sale" of SMI, both Markowitz and Skolnik gave information to the company's accountant regarding what to report on SMI's tax returns. After the "sale" of SMI, Markowitz and Skolnik helped Bogatin with SMI's tax returns to reflect the amount of gasoline sold by Markowitz and Skolnik through their different companies.

Harold Wapnick also testified at the criminal trial. Wapnick prepared the motor fuel tax returns for SMI for the periods May 1982 through July 1983. Wapnick received backup to prepare the returns for approximately three months. Thereafter, Markowitz and Skolnik only provided information which showed total gallons and broke down the gallons into various categories -- purchased and shipped.

Seth Wapnick, Harold Wapnick's son, testified at the criminal trial. Seth Wapnick also prepared sales tax returns for SMI. Originally, invoices showing product deliveries were provided by SMI in order to prepare the returns. After approximately three months, Markowitz and Skolnik provided Seth Wapnick with the number on a piece of paper or over the telephone.

CONCLUSIONS OF LAW

A. The first issues to be determined will be those associated with the motor fuel tax liability under Tax Law Article 12-A with respect to Michael Markowitz, Joseph Skolnik and GSI.

Tax Law former § 282(1) stated as follows:

"'Distributor' means any person, firm, association or corporation, who or which imports or causes to be imported into the state, for use, distribution or sale within the state, any motor fuel; and also any person, firm, association or corporation who or which produces, refines, manufactures or compounds motor fuel within the state. Motor fuel brought into the state in the ordinary fuel tank connecting with the engine of a motor vehicle, aeroplane, motor boat or other conveyance propelled by the use of motor fuel, and to be used only in the operation thereof, shall not be deemed imported within the meaning of this definition, if not removed from such tank except as used in the propulsion of such engine." (See also, 20 NYCRR former 410.1.)

Distributors are required to be registered with the Department of Taxation and Finance in order to be permitted to make sales of motor fuel in New York State (Tax Law former § 283).

Motor fuel is defined in Tax Law § 282(2) as follows:

"'Motor fuel' means gasoline, benzol or other product, except kerosene and crude oil, which is suitable for use in operation of a motor vehicle engine, but if kerosene or crude oil is compounded or mixed with any other product or products, and the resulting compound or mixture is suitable for use in the operation of any such motor vehicle engine, such resulting compound or mixture in its entirety shall be a 'motor fuel.'" (See also, 20 NYCRR former 410.0.)

Tax Law former § 283 also provided that the "tax commission" may require that a distributor file a bond with the Division to secure payment of the taxes due from a distributor pursuant to Article 12-A, specifically the tax on each gallon of motor fuel imposed by Tax Law §§ 289, 289-a, 289-b and 289-c. The Tax Law specifically limits this imposition by providing that nothing in Article 12-A shall be construed to require the payment of tax to the Division more than once on any quantity of motor fuel sold in the State (Tax Law former § 289-a). The tax, although payable by the distributor to the Division, is deemed to be paid on behalf of the purchaser, i.e., the person who ultimately used the motor fuel to operate motor vehicles on the public highways and waterways of the State (Tax Law former § 289-c[1], [2]).

Tax Law former § 286 required every distributor to "keep a complete and accurate record

of all sales of fuel" and of the number of gallons imported, produced, refined, manufactured or compounded (see also, 20 NYCRR former 410.9). Tax Law former § 288 required that if a distributor files a return which is incorrect, the Tax Commission shall determine the amount of tax due.

Tax Law former § 287 required distributors to file monthly returns "stating the number of gallons of motor fuel sold by such distributor in the state during the preceding calendar month," and containing any other information which the Division deemed necessary for audit and enforcement of the tax (see also, 20 NYCRR former 410.2). Further, the return required that the distributor list all purchases made by it including the identity of the seller, the location from which the fuel was purchased, the date of purchase, and the number of gallons purchased (20 NYCRR former 410.2[a]). Tax Law former § 287 also required distributors to include with each return the payment to the Division of the motor fuel taxes imposed by Article 12-A on each gallon of fuel sold by the distributor within the State, except that a credit is allowed for the amount of such taxes:

"where a distributor has purchased motor fuel prior to the expiration of the period covered by the return, upon which taxes imposed by this article have been or are required to be paid by another distributor."

Although there was no statutory exemption for tax-free sales made by one registered distributor to another, regulations provided that:

"the department, to avoid interfering with established trade procedure, will permit one registered distributor to sell motor fuel to another registered distributor tax free" (20 NYCRR former 410.7[a]).

During the period in issue here, the retail sales tax on motor fuel was collected on sales by distributors to non-distributors, such as retail service stations, since Tax Law former § 1101(b)(4)(ii) provided that "a sale of automotive fuel by a distributor is deemed to be a retail sale." Tax Law former § 1101(b)(4)(ii)(B) adopted the same meaning for the term "distributor" as Article 12-A. The tax collected by the distributor was included in the cost to the service station and passed through to the ultimate consumer (Tax Law former § 1111[e][4]). The price shown on the pump was to include the tax so paid (Tax Law former § 1111[d]). In addition,

Tax Law § 1138(a)(1) provides that if a sales tax return when filed is incorrect, the amount of tax due may be determined from such information as may be available and, if necessary, on the basis of external indices.

As set forth in the facts, GSI became a registered motor fuel distributor in December of 1982 and operated under motor fuel distributor number M-2410. It had been incorporated in 1967 but did not conduct business in motor fuel until 1982.

The Division's auditor, Grace Isaacs, on June 27, 1984, requested books and records for the period September 1982 through June 1984 to conduct an audit of motor fuel tax. No records were ever produced. The auditor utilized third-party information as more fully set forth in Finding of Fact "22" and two notices of determination were issued to GSI, as set forth in Finding of Fact "1[a]"), encompassing the period July 1982 through February 1984. Since GSI did not have a license to purchase motor fuel until December 1982, and the Division submitted no evidence of any sales or purchases prior to GSI's registration, or evidence that GSI conducted a motor-fuel business prior to registration, all taxes assessed prior to December 3, 1982 must therefore be cancelled.

However, the proper request for books and records having been made and GSI's failure to produce any records warranted the Division's use of third-party information. It was then the duty of petitioner to prove the results were erroneous. This standard has been applied by the courts, to wit:

"Here, the records provided by petitioner were inadequate to enable the auditor to conduct the necessary audit. The Division could therefore select an indirect audit method reasonably calculated to reflect the taxes due (see, Matter of A & J Gifts Shop-Vanni v. Chu, 145 AD2d 877, lv denied 74 NY2d 603; Matter of Club Marakesh v. Tax Commn. of State of N.Y., 151 AD2d 908, lv denied 74 NY2d 616). Moreover, it is well established that when the records provided by the taxpayer are incomplete, the burden rests with the taxpayer to establish by clear and convincing evidence that the method of audit used or the amount of tax assessed was erroneous (Matter of A & J Gifts Shop-Vanni v. Chu, supra). Here, petitioner has failed to meet that burden" (Mera v. Tax Appeals Tribunal, 204 AD2d 818, 611 NYS2d 716).

As in Mera, petitioner GSI has not met its burden and the notices, are sustained as modified, to reflect the date GSI began business as a registered motor fuel distributor.

The petitions of Michael Markowitz and Joseph Skolnik with regard to assessment 2449 must be denied. Assessment 2449 determined motor fuel tax under Article 12-A for the period July 1982 through October 1983 to be due from petitioners Skolnik and Markowitz as distributors of motor fuel. The Tax Law in effect during that audit period is applicable only to distributors, e.g., Tax Law §§ 284 (tax imposed on motor fuel sold by distributor), 286 (records to be kept by distributors) and 287 (payment of tax and returns to be filed by distributors). Even Tax Law § 288 pertains to determinations of tax of a distributor and issuance of notices of determination to distributors. The same provisions appear in the regulations in effect at the time (see, 20 NYCRR former part 410). It was not until the law changed in 1985 (L 1985, ch 44, eff June 1, 1985) that Tax Law § 288 provided for the assessment of penalty (equal to the amount of the motor fuel tax assessed against the distributor corporation) against an officer, director or shareholder of a corporation.

It should be noted, however, that Tax Law former § 289-b(4) provided that the term "distributor", as used in section 289-b, included stockholders under a duty to perform the act in respect of which the violation occurs. This is interpreted to mean that Markowitz and Skolnik, as co-owners of SMI and GSI, corporations with no officers other than sham nominees, were under a duty to file the returns and pay the taxes on behalf of those corporations and were liable for the penalties asserted by Tax Law former § 289-b(1) as included by definition in the term "distributor".

Further, there is ample reason to ignore the corporate veils petitioners Markowitz and Skolnik seek to use to protect themselves from the motor fuel tax liability assessed.

In Walkovsky v. Carlton (18 NY 414), the Court of Appeals stated:

"Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, 'pierce the corporate veil', whenever necessary to 'prevent fraud or to achieve equity' (International Aircraft Trading Co. v. Manufacturers Trust Co., 297 NY 285, 292)" (id. at 417).

Whether the corporate veil will be pierced is dependent upon the facts and equities of each case. But it must be clear that the owners exercised complete domination of the corporation with respect to the transaction attacked and the domination was used to commit a

fraud or wrong against the aggrieved party (see, Guptill Holding Corp. v. State, 33 AD2d 362, 364, 307 NYS2d 970, affd 31 NY2d 897, 340 NYS2d 638). Mere domination is not enough; there must be a showing of wrongful or unjust acts toward the aggrieved party (see, Morris v. Dept. of Taxation & Fin., 82 NY2d 135, 603 NYS2d 807).

The instant situation contains the facts and circumstances which justify piercing the corporate veils of GSI and SMI and holding petitioners Markowitz and Skolnik responsible for the tax. The plea allocutions of Michael Markowitz and David Bogatin, the testimony of Michael Markowitz at the criminal trial of Joseph Skolnik and the corporate documentation clearly show a pattern of conduct which was designed to conceal the purchase and sale of motor fuel and that they knowingly filed false tax returns with the intent to evade taxes, both motor fuel and sales.

They purposely created and owned multiple corporations which they staffed with phantom officers. They had no respect for the corporate identities of the various corporations they formed, deliberately moving offices and transacting business without regard for which corporation would be liable for said transactions. They maintained almost no records, thereby frustrating all efforts to determine actual tax liabilities.

They did, however, profit mightily from their endeavors. And this was the economic reality of the transactions conducted by petitioners:

"The economic reality of a transaction should be considered regardless of the form of the transaction where it is necessary to avoid the creation of a loophole in the Tax Law [citations omitted]. Where, as here, examination of the record reveals overwhelming evidence supporting the Tax Tribunal's finding that petitioners were involved in the corporation and obtained substantial income from said corporation as silent partners, the Tax Tribunal's determination was reasonable and should be upheld" (Matter of Iannello v. NY Tax Appeals Tribunal, ___ AD2d ___, 617 NYS2d 973).

For all of these reasons, it is held that petitioners Markowitz and Skolnik were properly assessed motor fuel tax.

B. The Division did not perform a separate sales tax audit of petitioner SMI. The sales tax assessment was based entirely on the gallons of motor fuel assessed for the motor fuel audit.

There had been an exhaustive investigation by the auditor to find the corporation

headquarters of SMI and its officers. After what can only be called a "runaround", the auditor managed to get the corporation's accountant to produce only three or four incomplete journal pages, a small number of truck delivery tickets and a promise to produce more books and records in the future (a promise never honored). Although the auditor called numerous times, no other records were produced. This investigation and request for records took place between April and August of 1983.

Given the complexity of the corporate maze through which the auditor was led and the number of oral requests she made to SMI's accountant, Mr. Wapnick, and the nature of the records requested, it is determined that an adequate request for books and records was made for both the motor fuel tax audit and the sales tax audit. This is so in light of the subpoena duces tecum issued to Joseph Skolnik on October 26, 1983 which commanded him to produce "all bills and records pertaining to all the business conducted by Shoppers Marketing for the period September 1, 1982 through October 26, 1983." As set forth in the facts, those records included:

- All purchase and sales invoices
- Bank statements
- Cancelled checks
- Deposit slips
- Any and all corporate bank accounts
- Corporate copy of all tax returns filed in New York City,
New York State and United States Government
- Cash receipts book
- General ledger
- Sales journal
- Accounts receivable ledger
- Accounts payable ledger
- Purchase journal
- Corporate minutes
- Incorporation papers

Once again, no books and records were produced. Given these circumstances, petitioners' claim that the request for books and records was deficient is specious. Petitioners cite Matter of Chartair, Inc. v. State Tax Commn. (65 AD2d 44, 411 NYS2d 41) to support their claim.

However, the spirit of Chartair is embodied in the following quotation:

"The honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (id. at 47, 411 NYS2d at 41).

SMI was hardly the taxpayer envisioned by the court in Chartair.

Further, the request for all books and records in this matter was not a weak and casual request (see, Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858; Matter of Scholastic Specialty Corp. v. Tax Appeals Tribunal, 198 AD2d 684, 603 NYS2d 357, lv denied 83 NY2d 751, 611 NYS2d 133).

Petitioner did not maintain sufficient records to permit a detailed audit to verify the taxable sales reported for the period (see, Matter of Vebol Edibles v. Tax Appeals Tribunal, 162 AD2d 765, 766, 577 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643) and, therefore, the auditor was justified in resorting to an indirect audit method (see, Matter of Sarantopoulos v. Tax Appeals Tribunal, 186 AD2d 878, 589 NYS2d 102). Although the method selected by the auditor must be "reasonably calculated to reflect the taxes due" (Matter of Club Marakesh v. State Tax Commn., 151 AD2d 908, 910, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276), the method need not be immune from attack as imprecise (see, Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 814-915, 526 NYS2d 679). "[W]here the taxpayer's own failure to maintain proper records prevents exactness in determination of sales tax liability, exactness is not required" (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 228, 402 NYS2d 74, 78, lv denied 44 NY2d 645, 406 NYS2d 1025).

Therefore, the Division's reliance upon the third-party records used in the motor fuel audit to determine gallons sold and purchased is determined to have been proper in the absence of any evidence to the contrary, and the assessment of additional sales and use taxes as set forth on the notices is sustained for the entire audit period. Due to the fact that fraud penalty was upheld against SMI (see, Conclusion of Law "C", infra) concerning these sales tax assessments, the notices are deemed timely (Tax Law § 1147[b]).

Since both Markowitz and Skolnik were 50% owners of SMI, exercised all control over the corporation and conducted the day-to-day affairs of the business, they were responsible for the collection and payment of sales and use taxes for the corporation, despite their scheme to use "front people" to shield them from liability (see, Matter of Iannello v. Tax Appeals

Tribunal, supra). The use of Szpila Tadeusz and Mieczyslaw Szczepkowski, two individuals who neither spoke nor wrote English, to place their names on various corporate documents, bank resolutions or tax returns, as president of SMI, was fraudulent and deliberately staged to shield petitioners Markowitz and Skolnik from personal liability, especially from State taxes. The two gentlemen noted above, listed in name as officers of SMI, did not have the capabilities to serve as actual officers and, in fact, did not. Markowitz and Skolnik owned and controlled all facets of the corporation until February 21, 1983, when David Bogatin officially took possession of the corporation. Therefore, only that portion of the assessments issued to Markowitz and Skolnik for additional sales and use taxes due for the period September 1, 1982 through February 21, 1983 is sustained.

C. For each of the quarters in the audit period the Division assessed fraud penalty pursuant to Tax Law § 1145(a)(2), which provides for the imposition of a civil fraud penalty if the failure to file a return or pay over any tax is due to fraud. The burden of proving fraud by clear and convincing evidence has consistently been interpreted to reside with the Division (see, Matter of Ilter Sener, Tax Appeals Tribunal, May 5, 1988; Matter of Cinelli, Tax Appeals Tribunal, September 14, 1989; Matter of Waples, Tax Appeals Tribunal, January 11, 1990). Imposition of the fraud penalty requires "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing" (Matter of Ilter Sener, supra, quoting Matter of Shutt, State Tax Commn., July 13, 1982; see, Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988). On the record presented here, it is concluded that the Division has proven by clear and convincing evidence that petitioners acted with willful intent to fraudulently deprive the State of the sales and use taxes owed.

Because the sales tax penalty provisions are modeled after Federal penalty provisions, Federal statutes and case law are properly used for guidance in ascertaining whether the requisite intent for fraud has been established (Matter of Uncle Jim's Donut and Dairy Store,

Tax Appeals Tribunal, October 5, 1989; Matter of Ilter Sener, supra). Factors found to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, a pattern of repeated deficiencies, the taxpayer's entire course of conduct and the taxpayer's failure to maintain bank accounts or adequate records (see, Merritt v. Commr., 301 F2d 484; Bradbury v. Commr., 71 TCM 63; Webb v. Commr., 394 F2d 366; see also, Matter of AAA Sign Co., Tax Appeals Tribunal, June 22, 1989). Because direct proof of the taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's entire course of conduct (Intersimone v. Commr., 87 TCM 290; Stone v. Commr., 56 TC 213, 223-224; Korecky v. Commr., 781 F2d 1566). Fraud may not be presumed or imputed, but rather must be established by affirmative evidence (Intersimone v. Commr., supra). Hence, a finding of fraud should not be sustained where the attendant circumstances create at most only a suspicion of fraud (Goldberg v. Commr., 239 F2d 316). The issue of whether fraud with the intent to evade payment of tax has been established presents a question of fact to be determined upon consideration of the entire record (Jordan v. Commr., 86 TCM 389; see, Matter of AAA Sign Co., supra).

It is well settled that consistent and substantial underreporting of large amounts of taxable income over a period of years is strong evidence of fraud (Merritt v. Commr., supra; Jordan v. Commr., supra). It has also been noted that the mere understatement of income, standing alone, is not sufficient to establish fraud (Intersimone v. Commr., supra). Consequently, in order to establish fraud, it is necessary that other indicia of the taxpayer's specific and willful intent to evade the tax in conjunction with substantial understatement of income must be shown (see, id. [where substantial understatement of income, coupled with the showing that the taxpayer's records were incomplete and inaccurate and that the taxpayer failed to supply the bookkeeper with all relevant data warrants a finding of fraud]). Thus, along with proof of underreporting, the circumstances of the particular case must contain some affirmative indication of the required specific intent to deliberately evade payment of taxes due and owing (see, Korecky v. Commr., supra; Cirillo v. Commr., 314 F2d 478; Matter of Uncle Jim's Donut and Dairy Store, supra).

The circumstances of the two sales tax audits are inextricably linked for the purpose of the fraud penalty asserted. Petitioners Markowitz and Skolnik were the co-owners of both GSI and SMI, although they attempted to shield themselves from liability by using sham nominees as officers, i.e., Tadeusz, Szczepkowski and Bercovici, but continuing to control all facets of the business, including purchases and sales. In fact, Markowitz's guilty plea to three counts of the indictment provides clear evidence of fraudulent conduct.

Additionally, the plea allocution of David Bogatin asserted that he, Markowitz and Skolnik had attempted to cheat the State out of millions of dollars in motor fuel and sales taxes by purchasing gas from Lesez Corporation and receiving invoices which stated tax paid, when in fact they knew no tax had been paid.

During the period September 1, 1982 through May 31, 1983, SMI imported and evaded taxes on approximately 50,000,000 gallons of gas purchases. SMI listed purchases from only two sources but actually purchased from at least six sources. SMI placed gas it had purchased in AVI accounts and removed it from that account by another corporation (Lesez). SMI also claimed credits for tax-free sales which it never made.

These practices led to gross underreporting of taxes due. Conveniently, there were no meaningful records kept by SMI or GSI and even a subpoena to Skolnik and Markowitz did not lead them to produce any substantiation of the returns they filed.

Finally, the fact that Mr. Skolnik did not come forward to explain his actions must be considered as additional support for finding fraud. It was his choice not to provide documentation or testimony to explain the discrepancies found by the Division and he was in the best position to do so but chose to remain silent. A taxpayer's failure to credibly explain the absence of records will be considered additional support for a finding of fraud (Matter of Waples, supra).

The Division's assertion of fraud against SMI, Michael Markowitz, as officer of SMI, Joseph Skolnik, as officer of SMI and GSI, and Joseph Skolnik, as officer of GSI, is sustained.

D. GSI and Joseph Skolnik, as officer, were assessed additional sales and use taxes for

the period March 1, 1983 through February 29, 1984. As in the case of the sales tax assessment with respect to SMI (Conclusion "B" above), the Division did not perform a separate audit for sales tax concerning GSI. The assessments issued were based on the unreported purchases and sales of motor fuel which were discovered in the motor fuel audit.

As mentioned therein, the Division's auditor made numerous inquiries for books and records. By letter to Harris Polansky dated June 27, 1984, she requested "all books and records" as set forth more fully at Finding of Fact "22". On July 9, 1984, the auditor called the next representative, Austin Campriello, Esq., and read him the June 27, 1984 letter to Harris Polansky. She continued to pursue the records through October of 1984, but never received any records.

Given the requests made herein and the specific records requested, an adequate request for books and records was made of GSI, meeting and exceeding the requirements of Christ Cella and Scholastic Specialty Corp. (supra).

Therefore, when no records were produced, the Division was justified in using external indices to estimate the tax (Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552). Once the audit is performed, it is presumed correct (Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988). The taxpayer bears the burden of proving the assessment is erroneous (Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113) or that the audit methodology was unreasonable (Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536).

Petitioners GSI and Skolnik have offered no evidence to challenge the assessments and they are sustained. For the reasons stated in Conclusion of Law "C", the fraud penalty is also sustained.

Due to the fact that fraud has been determined and fraud penalties assessed, the notices are deemed timely (Tax Law § 1147[b]).

Joseph Skolnik was co-owner and an officer of GSI during the period in issue. The facts reveal that he and Michael Markowitz controlled all facets of GSI's business and made all its

business decisions, they had meaningful access to its books and records (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990), and derived substantial income from the business. Clearly, Mr. Skolnik had the authority to act on behalf of GSI (Blodnick v. State Tax Commn., supra).

It is determined that Joseph Skolnik was a person responsible to collect sales and use taxes on behalf of GSI and the notices issued to him are sustained in full. Also, based upon the recent case of Matter of Iannello v. Tax Appeals Tribunal (supra), the fact that Mr. Skolnik at times chose to use nominees as officers does not shield him from liability.

E. Petitioner Shoppers Marketing, Inc. (DTA #807556) did not appear at the hearing held on May 18 and 19, 1994 (sales and use taxes) and is hereby held in default, with prejudice, regarding that matter.

F. The petitions of Shoppers Marketing, Inc., Gas Stop, Inc., Michael Markowitz, Joseph Skolnik, Michael Markowitz, as officer of Shoppers Marketing, Inc., Joseph Skolnik, as officer of Shoppers Marketing, Inc., and Joseph Skolnik, as officer of Gas Sop, Inc., are granted to the extent set forth in Conclusions of Law "A" and "B" above but in all other respects are denied and the nine notices of determination and demands for payment of motor fuel and sales and use taxes due are sustained. As noted in Conclusion of Law "E", Shoppers Marketing, Inc. is held in default, with prejudice, regarding its sales tax liability in DTA #807556.

DATED: Troy, New York
March 30, 1995

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE